TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 199

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, AND WILBUR ERSKINE, PETITIONERS,

vs.

HARRY W. VOSS, AS TRUSTEE OF THE ESTATE OF WILBUR ERSKINE, BANKRUPT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1924

CERTIORARI GRANTED MARCH 2, 1925

(30,685)

(30,685)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1925

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States courtroom, in the city of Chicago, in said Seventh Circuit, on the third day of October, 1922, of the October term, in the year of our Lord one thousand nine hundred and twenty-two, and of our Independence the one hundred and forty-seventh

And afterwards, to wit: On the eighteenth day of June, 1923, there was filed in the office of the clerk of this court a certain "Notice of filing of Petition to Review" which said Notice is in the words and figures folowing, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, BANKRUPT. In the Matter of the Petition of HARRY W. VOSS for Review

To Daniel H. Ortmeyer, attorney for Harold Taylor, trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine:

You are hereby notified that on the 18th day of June, 1923, at nine o'clock A. M., I will file in the clerk's office of the United States Circuit Court of Appeals for the Seventh Circuit in the city of Chicago, a petition for review in the above entitled cause, a copy of which petition is hereto attached as part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have such a case set down for hearing.

Walker & Walker, Attorneys for Harry W. Voss, Trustee in Bankruptcy of the Estate of Wilbur Erskine.

I hereby accept service of the above notice on this 8th day of June, 1923.

Daniel H. Ortmeyer, Attorney for Harold W. Taylor, Trustee under the Will of Mary E. Erskine, Deceased, and Wilbur Erskine.

Endorsed: Filed June 18, 1923. Edward M. Holloway, Clerk.

And afterwards, to wit: On the same day, *to* eighteenth day of June, 1923, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Monday, June 18, 1923.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Presiding Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

Now this day comes Harry W. Voss, as Trustee of the estate of Wilbur Erskine, Bankrupt, by his counsel, and presents a petition to review and revise an order of the District Court of the United States for the District of Indiana, entered therein on April 24, 1923, In the Matter of Wilbur Erskine, Bankrupt.

It is ordered by the court that the said petition to review and revise be filed, and that the respondents answer said petition with-twenty days (20) from the service of a certified copy of this order.

And afterwards, on the same day, to wit: On the eighteenth day of June, 1923, there was filed in the office of the clerk of this court a certain Petition to Review and Revise, which said Petition is in the words and figures following, to wit:

1 IN THE UNITED STATES CIRCUIT COURT OF APPEALS Filed Ju 1923.

For the Seventh Circuit

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

To the Honorable Judges of the United States Circuit Court of Appeals, For the Seventh Circuit:

The petition of Harry W. Voss, as Trustee of the estate of Wilbur Erskine Bankrupt, respectfully shows unto the court,

First: That on the 20th day of December, 1921, Wilbur Erskine was adjudged a bankrupt in the District Court of the United States for the District of Indiana.

Second: That on the 25th day of February, 1922, Harry W. Voss, your petitioner, was duly appointed Trustee of the estate of said bankrupt, having qualified as such and has since been and is now in the discharge of the duties of said trust.

Third: That at the time of the filing of the petition in bankruptcy, the said Wilbur Erskine was the owner of certain real estate in Vanderburgh County, State of Indiana of the value in excess of more than Twenty Thousand Dollars ($20,000.00).

Fourth: That under the orders of the Bankruptcy Court, said real estate was sold by said Trustee for the sum of Thirty-six Thousand, Eight Hundred Seventy Dollars ($36,870.00).

Fifth: That at the time of said sale, Harold Taylor, Trustee under the will of Mary E. Erskine, former wife of bankrupt, joined in said conveyances so that a complete title to said real estate could be conveyed to the purchaser thereof and the Trustee agreed with said Harold Taylor, Trustee, and Wilbur Erskine that he would pay over to them such portion of the purchase price as might thereafter be ordered by said bankruptcy court.

2 Sixth: That on the 27th day of May, this Trustee filed his verified petition in which he showed that the real estate in said bankrupt estate was of the value of more than twenty thousand dollars ($20,000.00).

Seventh: That at the time of the adjudication of bankruptcy herein, the bankrupt had a wife living, namely Mary E. Erskine who died on the 21st day of March, 1922; that Harold Taylor was named Trustee in the will of the said decedent and became vested with all of the real estate of the said Mary E. Erskine, deceased. That Wilbur Erskine may have acquired an interest in said real estate by the death of Mary E. Erskine, and such being the fact, that Harold Taylor as such Trustee and Wilbur Erskine as surviving widower, claim an interest in said real estate and the said Trustee in said petition, denies that Mary E. Erskine, during her lifetime or that Wilbur Erskine or Harold Taylor, Trustee, subsequently acquired any right, title or interest in the real estate of bankrupt.

Seventh: That on the 26th day of June, 1922, the said Wilbur Erskine and Harold Taylor as Trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death, an agreed statement of facts was submitted which said agreed statement of facts is attached hereto marked "Exhibit A." That thereafter, on the 14th day of March, 1923, the Referee entered an order upon said petition and answer, a copy of which order is filed herewith and made part hereof marked "Exhibit B."

Your petitioner further shows that thereafter on the 21st day of March, 1923, this Trustee filed his petition for review; that said Referee set out the error complained of and prayed that the Referee forthwith certify to the Judge of the District Court, the question presented, a summary of the evidence relative thereto and the finding and order of the Referee thereon, whereupon said Referee certified to said Judge the question presented and a summary of the
3 evidence relative thereto, the finding and the order thereon, a copy of which order of the Referee is filed herewith as part hereof marked "Exhibit C."

Your petitioner further shows that thereafter, on the 24th day of April, 1923, the judge of said District Court in reviewing the findings and orders of the referee on said questions, entered an order sustaining the order of the Referee, a copy of which order is filed herewith as part hereof marked "Exhibit D."

Your petitioner further shows that the question of law deciding by the District Court and by the order of the

Referee was that under the Bankruptcy Act, and by virtue of the laws of the State of Indiana, a widow of bankrupt who dies before the sale of the real estate of bankrupt, is vested in fee with one-fifth of the real estate of bankrupt, in the event of his real estate being of greater value than Twenty Thousand Dollars ($20,000.00); that the Indiana law of judicial sales which fixes the interest of creditors in the judgment debtors' real estate, is unavailing in bankruptcy. That the inchoate interest in real estate of the wife is greater in bankruptcy than under the State Laws of the State of Indiana.

Your petitioner further shows that he has by the orders of said Referee of said District Court injured thereby and that the error complained of, consists of

First: That the District Court direct the payment of one-fifth of the proceeds of the sales of real estate made by said Trustee to be paid to Harold Taylor as Trustee under the will of Mary E. Erskine, deceased and refused to permit your petitioner to retain the money in his hands resulting from the sales of the real estate of bankrupt.

Second: That Harold Taylor as Trustee under the will of Mary E. Erskine, deceased, was not entitled to any part of the proceeds of the sale of the real estate of bankrupt.

Third: That the District Court provided that one-fifth of the proceeds of the sales of real estate made by said Trustee be paid to Harold Taylor as Trustee under the will of
4 Mary E. Erskine, deceased; that the laws of the State of Indiana in the case of judicial sales would require that but one-fifth of Twenty Thousand Dollars ($20,000.00) be retained for the benefit of the widow.

Your petitioner further shows that under the laws of the State of Indiana, the interest of the wife of any debtor does not vest until after a judicial sale or until after the death of the husband; that there was no judicial sale of the real estate of bankrupt until after the death of Mary E. Erskine, wife of bankrupt; that under and by virtue of the laws of the State of Indiana, the interest of the said wife of Wilbur Erskine depended entirely upon the death of Wilbur Erskine prior to the death of his wife or the sale of his real estate under judicial process; that neither of said events happened before the death of Mary E. Erskine; that therefore, the interest conveyed by said Trustee in bankruptcy, your petitioner, was in fee simple to the real estate of bankrupt.

Your petitioner asks for an early hearing of this matter that the same may be presented upon petition and exhibits filed herewith or if your honor so direct, upon the original pleadings, proofs, evidence and proceedings now on file in the office of the Clerk of the United States District Court where said proceedings were had,

Wherefore, your petitioner prays that an order of the said District Court may be reviewed and revised in matters of law so as to adjudge your petitioner entitled to retain all of the money in his hands resulting from the sales of real estate of bankrupt for his costs herein and all proper and equitable relief.

WALTER WALKER
Attorney for petitioner.

State of Indiana
Vanderburgh County } ss:

Your petitioner, Harry W. Voss, on oath, states that the statements in the foregoing petition are true as he verily believes.

HARRY W. VOSS.

Subscribed and sworn to before me this 8th day of June, 1923.

FORREST M. CONDIT
(Seal) *Notary Public*

My commission expires July 20, 1926.

5 EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy. #625.

The following stipulations are made by the parties hereto for the purposes of this submission:

1. The said Wilbur Erskine, the bankrupt herein, was on December 20, 1921, duly adjudicated a bankrupt in the United States District Court for the District of Indiana, on

his voluntary petition in bankruptcy filed herein in said Court on December 19, 1921.

2. That at the time of the filing of said petition herein in bankruptcy on December 19, 1921, and at the time said Wilbur Erskine was adjudged a bankrupt on December 20, 1921, he was the owner of the following described real estate, and which was of the then value of more than Thirty Thousand Dollars ($30,000), to-wit:

6 3. That Harry W. Voss, Trustee for said bankrupt herein was duly chosen, named and qualified as such Trustee in these proceedings on the 25th day of February, 1922.

4. That at the time of the filing of petition in bankruptcy herein and of such adjudication in bankruptcy said Wilbur Erskine was a resident and an inhabitant of Vanderburgh County, in the State of Indiana, and had been such resident and inhabitant for many years prior thereto.

5. That at the time of such adjudication in bankruptcy, said bankrupt had a wife living, namely: Mary E. Erskine, sometimes known as Bonnie Erskine, who was also a resident and an inhabitant of said Vanderburgh County, State of Indiana, and who thereafter died testate on March 21, 1922. That said Mary E. Erskine was a first wife, with children, said Wilbur Erskine and Mary E. Erskine having been married at Evansville, Indiana, November 26, 1884, and lived together at said City continuously on down to date of her death.

6. That the last will of said Mary E. Erskine, deceased, was thereafter on or about the 24th day of March, 1922, duly admitted to probate in the Vanderburgh Probate Court of Vanderburgh County, in the State of Indiana, a copy of which will is hereto attached, which shall be taken as a true copy.

7. That said Mary E. Erskine, deceased, was survived by her husband, the answering defendant herein, Wilbur Erskine, with whom she was then living and who is now her widower, and their two children. That said Mary E. Erskine was a first wife.

8. That said bankrupt, Wilbur Erskine, husband of said deceased Mary E. Erskine, was seized in fee simple of said real estate first above described, during his said marriage and continuing down to and including the dates heretofore stated, to-wit: December 19, 1921, the date of the filing of the petition in bankruptcy herein, and December 20, 1921,

7 when he was adjudicated a bankrupt in these proceedings.

9. That said Mary E. Erskine, deceased, had never joined in any conveyance of any of said real estate hereinabove referred to, nor did she join in said Wilbur Erskine petition in bankruptcy herein.

10. That copy of the will of Mary E. Erskine attached hereto and identified as Exhibit A shall be taken as a true copy of said will and the probate thereof may be used upon a submission of the petition herein.

11. That prior to the death of said Mary E. Erskine, deceased, she had not filed any suit for partition or to otherwise have her interest in said real estate of said Wilbur Erskine, the bankrupt herein, set off to her.

12. That prior to the death of said Mary E. Erskine, the Trustee in Bankruptcy had been given and had received offers for the purchase of one or more of the pieces of real estate of said bankrupt, but none of said property had been sold or otherwise disposed of at the time of her death.

13. That all of the files and papers or any of them connected with the bankruptcy may be considered in evidence and may be referred to by either of the parties hereto.

14. That the values of the real estate in question are fixed by the amounts for which sales have been made.

15. That all of said real estate has been sold under stipulation and arrangements made by and between the Trustee in Bankruptcy herein, and said Wilbur Erskine as surviving husband, and Harold Taylor as Trustee under said last will of the decedent.

HARRY W. VOSS
Trustee in Bankruptcy.
WILBUR ERSKINE.
HAROLD TAYLOR,
Trustee under will of Mary E. Erskine, deceased.

DANIEL A. ORTMEYER
Atty. for Petitioners.
WALTER WALKER
Atty. for Respondents.

8 I, Mary E. Erskine, of Vanderburgh County, Indiana, do hereby make and publish this my last will.

1. In event my husband, Wilbur Erskine, survives me, I do hereby, after the payment of my just debts, give, devise and bequeath to Harold Taylor all my estate real and personal of every name, nature and description with full powers of disposition, conveyance and transfer thereof, to have and

to hold to him and his heirs and to his successors in this trust, In Trust for the uses and purposes following, that is to say:

The said Trustee shall take so much of the rents, profits and income of the said trust estate as to him shall seem proper, and at his full discretion and upon his own judgment as to the propriety thereof, pay over from time to time, as he shall see fit, to my said husband and to the other members of my family whether living with or apart from him, for his and their use and support, and for the support, maintenance and education of my grandchild or grandchildren or to the said Wilbur Erskine, to the exclusion of the other members of my family, or to anyone or more of the said members of my family to the exclusion of said Wilbur Erskine, and of any other members of my family, the amounts so as to be paid over as well as the person or persons to whom such payments to be made or may be made being at the full discretion of said Trustee. In event of the payment to any of my children or grandchild or grandchildren of any sum or sums of money out of said trust estate, or the rents, profits and income thereof, the same shall be treated as an advancement thereof out of said estate and in the event of the final settlement and distribution of said estate as hereinafter provided, such advancements shall be taken into consideration.

9 II. Said Trustee is further authorized in his discretion to pay over and deliver to said cestui que trust or to anyone or more of the same to the exclusion of the others, any part of the principal of said trust fund or to convey any of the trust real estate to any one or more of the same but such payments or conveyances, if made to any of my children or grandchild or grandchildren, shall not exceed in amount or value what their share would be at such time if the whole estate were then to be divided as if upon a termination thereof, as hereinafter provided, and the same shall be charged as an advancement out of such trust estate and if the amount of the same shall be equal to what such share would be upon a division of such trust estate at such time, then such child or children shall not be entitled to any further interest therein. And if in the exercise of the authority and discretion vested in said Trustee, he shall transfer and convey all the trust estate at any time in or remaining in his hands to the exclusion of the remaining cestui que trust such

act shall terminate such trust and the remaining cestui que trust shall have no further rights or interests therein.

III. Said Trustee is hereby authorized to make sale at any time in his discretion of any of the trust real estate and to make any changes in the investments of said trust personal estate, and this authority shall extend to the change of investment from real to personal property and from personal to real. And said Trustee shall not be held responsible for mistakes in the management of and dealing with said trust estate.

IV. In event at the end of any year said Trustee shall not have paid out under his authority and discretion the whole of the income of said trust estate, he may at his discretion invest the same as principal or hold the same not exceeding one year for the purposes of the trust, and any part then remaining shall be added to the principal of said trust estate.

V. Upon the death of my husband, provided that my daughter, Mary Louise Erskine, shall then have arrived at the age of thirty years, I direct that the Trust Estate should be closed and the remainder thereof distributed among my children, the child or children of any deceased child to take the share of such deceased child, taking into consideration any advancements made them before such distribution under the Trust herein created, such advancements being chargeable with interest at four per cent. (4%) per annum from their respective dates up to the time of distribution. And in event the advancements cannot be equalized in the distribution of said personal trust estate, then said Trustee in the conveyance to said children or their children in their place, as above provided, of the trust real estate, shall make provision for the complete and final equalization thereof by conveying to the said cestui que trusts in such manner that the several rights of the same may be adjusted upon partition. And in event that either of my children be not then surviving and leaving no child or children surviving, the share of such deceased child shall go to my surviving child; but if any deceased child shall leave any surviving child or children, then the child or children of any deceased child shall stand in place of any deceased child under provision of this will.

VI. Said Trustee shall be entitled to a reasonable compensation for his expenses, services, and responsibilities, and shall have the right and power to appoint proper agent or

agents to assist him in the management of the trust estate, but the exercise of the judgment and discretion of the Trustee in payments or conveyances to the cestui que trusts as herein provided for, and in the final distribution of the estate, shall not be delegated to any person.

VII. In event of the death, resignation or disability of said Harold Taylor, then A. G. Torian is hereby ap-
11 pointed as Trustee in his stead, under the trust herein created, and in event of his death, resignation, declination or disability then Steven W. Cook is appointed as Trustee in his place, and stead.

VIII. In event of the death of my husband before my own, then I devise and bequeath all my estate, real and personal of every kind and description to my children, the child or children of any deceased child to stand in place of the deceased parent, share and share alike.

I hereby appoint A. G. Torian as the executor of this will and direct that as soon as may be after my decease, in event I do not survive my husband, such executor shall deliver to said Trustee all my estate, real and personal, remaining after payment of my just debts, and that hereafter my estate be closed. In event said A. G. Torian for any reason does not qualify as such executor, then I appoint Harold Taylor as such executor.

In witness whereof and to each page of this Will I hereby subscribe my name this 17th day of December, 1921.

(Signed) MARY E. ERSKINE

The foregoing will and each page thereof was signed, declared and acknowledged by the above named testatrix, Mary E. Erskine, to be her last will in our presence and was signed by us as attested witnesses at her request in her presence and in the presence of each other on this 17th day of December, 1921.

(Signed) BRUNHILDE BOETTICHER
CARL F. BOETTICHER.

Probated March 24th, 1922,
A. G. Torian qualified as Executor.

12 EXHIBIT "B."

This Agreement between Wilbur Erskine, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine, Witnesseth: that,

Whereas, Harry W. Voss is the duly appointed and qualified Trustee in Bankruptcy of Wilbur Erskine in proceedings pending in the United States District Court for the District of Indiana, and as such is vested with the title to the real estate owned by the said Wilbur Erskine at the time of his bankruptcy; and,

Whereas, a question has arisen as to the title of such real estate, and there is a claim upon the part of said Wilbur Erskine and upon the part of said Harold Taylor as Trustee of Mary E. Erskine, who was in her lifetime, the wife of Wilbur Erskine, that there is an interest in the real estate which at the time of the bankruptcy, belonged to said Wilbur Erskine, either in said Harold Taylor Trustee as such Trustee, or Wilbur Erskine personally as surviving husband; and,

Whereas, the question of such interest and the extent thereof if it exists is now pending and under consideration before the Bankruptcy Court presided over by Charles A. Burnett, Referee in Bankruptcy; and,

Whereas, in the meantime, said Voss as Trustee in Bankruptcy is making efforts to sell said real estate and it is to advantage of all of the parties hereto that said real estate should be sold at the best price obtainable and that a better price would be obtained if the whole title can be conveyed,

13 Now, Therefore, it is agreed that the said Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and the said Wilbur Erskine in his own right as surviving husband, will join with the said Voss as Trustee in bankruptcy in the conveyance of any real estate sold by him, and the said Voss as such Trustee upon his part agrees that he will hold of the amount realized from such sale, an amount being not less than one-fifth of the purchase price to protect whatever rights the said Taylor as Trustee and the said Erskine or either of them, may have in the said real estate and in the event the final decision in the courts is in favor of the said Taylor Trustee or the said Erskine, the said Voss will pay over to the one entitled thereto, the amount found

to be due the said Erskine or said Taylor Trustee on account of the interest claimed by them or either of them in said real estate. The intent of this agreement is to make a complete title to any purchaser and realize the most possible out of the sale of said real estate without prejudice to the rights of any of the parties hereto as to their interests in said real estate.

In Witness Whereof, the above named parties, have hereunto set their hands and seals this 24th day of June, 1922, In triplicate.

(Signed) HARRY W. VOSS,
Trustee
WILBUR ERSKINE
HAROLD TAYLOR,
Trustee under will of Mary E. Erskine, deceased.

14 EXHIBIT "B." Exhibi

Duplicate

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

At Evansville, in said district, on the 14th day of March, 1923. Before Charles A. Burnett, Referee in Bankruptcy.

Harry W. Voss, the trustee herein, having filed, on the 27th day of May, 1922, his verified amended petition herein showing that there is real estate in said bankrupt estate of the value of more than $20000.00, that at the time of the adjudication in bankruptcy herein the bankrupt had a wife living, namely, Mary E. Erskine, who died testate on the 21st day of March, 1922, that Harold Taylor was named trustee in the will of said decedent and is vested with all the real estate that said Wilbur Erskine may have acquired and interest in by the death of said Mary E. Erskine, that said Harold Taylor, as such trustee, and said Wilbur Erskine, as such surviving widower, claim an interest in said real estate, and that

said trustee in bankruptcy denies that said Mary E. Erskine had during her lifetime, or that said Wilbur Erskine or said Harold Taylor, trustee, subsequently have acquired any right, title or interest in said real estate; and on the 26th day of June, 1922, the said Wilbur Erskine and said Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death; the said Harry W. Voss, the trustee in bankruptcy, appearing herein by Walker & Walker, his attorneys, and the said Wilbur Erskine and Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, appearing by Daniel H. Ortmeyer and Harold Taylor; and at Evansville, in said district, on the 21st day of November, 1922, a hearing having been had upon the issues joined, an agreed statement of facts submitted, and argument of counsel begun but not concluded and such argument having been concluded on the 22nd day of November, 1922, and thereupon it having been agreed that briefs should be filed; and said briefs having been submitted and read and the evidence having been duly considered and the referee being advised in the premises; now, therefore,

It is ordered:

That said trustee in bankruptcy take nothing by his said amended petition and that the same be and it hereby is dismissed.

That said Harold Taylor, as such trustee under the last will of Mary E. Erskine, deceased, is entitled to and that he do have and recover herein an amount equal to one-fifth of the proceeds of the sales of the real estate which have been made by the trustee in bankruptcy herein pursuant to the stipulation and agreement entered into by said Harry W. Voss, tustee in bankruptcy, Wilbur Erskine, as such surviving husband, and Harold Taylor, as said trustee, under which all of the real estate of the bankrupt has been sold and deeds of conveyance made in which all of said parties have joined, the said one-fifth of said proceeds amounting to the sum of $

That said Harry W. Voss, the trustee herein, pay said sum of $ to said Harold Taylor, as trustee under the last will of Mary E. Erskine, deceased, out of the funds in his hands belonging to said bankrupt estate.

CHARLES A. BURNETT
Referee in Bankruptcy.

16 EXHIBIT "C." Exhib

Duplicate

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana.

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

To the Honorable Albert B. Anderson, District Judge:

I, Charles A. Burnett, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 14th day of March, 1923.

That, on the 21st day of March, 1923, the trustee in bankruptcy herein, feeling aggrieved thereat, filed a petition for a review of such order, which was granted.

There is no dispute as to the facts involved in the question herewith submitted, and such facts are set out in the briefs of counsel.

The question presented on this review is:

Who takes the wife's inchoate dower interest in the real estate owned by the bankrupt on the date he was adjudged a bankrupt, the wife being then alive, but later dying testate, after the appointment and qualification of the trustee in bankruptcy herein, but before said trustee had sold any of such real estate? In other words, Did Mary E. Erskine, wife of Wilbur Erskine, the bankruut, by virtue of the laws of the State of Indiana, acquire an interest in the real estate owned by said bankrupt at the time of his adjudication in bankruptcy, and had such interest became absolute and vested in her at and prior to her death?

I hand up herewith, for the information of the Judge, the following:

17 (1) Trustee's amended petition.

(2) Answer of Wilbur Erskine and Harold Taylor, trustee.

(3) Trustee's petition for review and assignment of errors, in duplicate.

(4) Trustee's brief on review, in duplicate.

The attorneys for the trustee submit a request for oral argument.

Dated at Lafayette, Indiana, March 21, 1923.

Respectfully submitted,

CHARLES A. BURNETT
Referee in Bankruptcy.

D." 18 EXHIBIT "D."

IN THE DISTRICT COURT OF THE UNITED STATES

For the District of Indiana

In the matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy, No. 625

April 24, 1923.

The matter of the petition of Harry W. Voss, Trustee, for a review of the referee's finding herein coming on for a hearing before the court, and the court having examined said petition and being sufficiently advised in the premises, the prayer thereof is now denied and the finding of the referee is approved, to which ruling of the court the trustee at the time excepts.

19 (Endorsed) No. 3298 In the United States Circuit Court of Appeals for the Seventh District In the matter of Wilbur Erskine, Bankrupt. In Bankruptcy No. 625. Petition to Review & Revise. Order of District Court of Indiana. Filed Jun 18 1923 Edward M. Holloway Clerk Walker & Walker Attorneys and Counselors at Law Evansville, Ind.

And afterwards, to wit: On the eighteenth day of June, 1923, in the October term aforesaid, came the Petitioner, by his counsel Messrs. James T. Walker and Henry B. Walker and filed in the office of the clerk of this court their appearances which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1922

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, Petitioner,

vs.

HAROLD TAYLOR, Trustee, etc., et al., Respondents

The clerk will enter *my* appearances as counsel for the petitioner.
James T. Walker, Henry B. Walker, Evansville, Ind.

Endorsed: Filed June 18, 1923. Edward M. Holloway, Clerk.

And afterwards, to wit: on the seventh day of July, 1923, came the Respondents by their counsel Messrs. Harold Taylor, John R. Browne and Daniel H. Ortmeyer and filed in the office of the clerk of this court their appearances, which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1923,

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee in Bankruptcy, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

The clerk will enter my appearance as counsel for the Respondents.

Harold Taylor, John R. Browne, Daniel H. Ortmeyer, 1514 Merchants Bank Buldg., Indianapolis, Indiana.

Endorsed: Filed July 7, 1923. Edward M. Holloway, Clerk.

And afterwards, on the same day, to wit: On the seventh day of July, 1923, there was filed in the office of the clerk of this court a certain "Motion to Dismiss Petition to Review and Revise" which said Motion is in the words and figures following, to wit:

19½ IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Filed J
1923.

For the Seventh Circuit.

No. 3298.

In the Matter of
Wilbur Erskine,
Bankrupt. } In Bankruptcy No. 625.

MOTION BY HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, TO DISMISS THE PETITION TO REVIEW AND REVISE IN MATTER OF LAW FILED BY HARRY W. VOSS, TRUSTEE IN BANKRUPTCY.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Comes now, Harold Taylor, Trustee under the Will of Mary E. Erskine, deceased, and hereby respectfully moves the Court to dismiss the petition of Harry W. Voss, Trustee in Bankruptcy, to review and revise in matter of law the order of the United States District Court for the District of Indiana made and entered herein April 24, 1923, affirming an order of March 14, 1923, by Hon. Charles A. Burnett, Referee in Bankruptcy herein, as exhibited by said petition, and to affirm the order of the United States District Court for the District of Indiana, on the following grounds, to wit:

1. That no appeal has been asked for, or granted or taken by the said petitioner from the order of the United States District Court for the District of Indiana, entered on
20 April 24, 1923, and now herein sought to be reviewed and revised, and the time allowed for such an appeal had fully elapsed before the filing of the petition herein.

2. The nature of the proceedings exhibited by said petition is that of a controversy arising in bankruptcy proceedings which may be properly presented to this Court only by way of an appeal or writ of error under Sections 24a and 25 of the Bankruptcy Law and not by petition to review and revise in matter of law under Section 24b.

3. That said petition was not filed herein within a reasonable time after the entry of the order of the United States District Court for the District of Indiana, entered herein, on to-wit: April 24th, 1923, and hereby sought to be reviewed and revised.

4. The petition does not sufficiently or definitely state the matter of law sought to be submitted for review and revision.

5. The petition does not correctly state the matter of law sought to be submitted for review and revision.

6. The question of law sought to be submitted by the petition to review and revise is not fairly or correctly stated in said petition in this:—

(a) It is not stated on page 3 of the petition that Mary E. Erskine, deceased, was alive and living with her husband, said bankrupt, at the date of the filing of the petition, the adjudication and appointment of Trustee in Bankruptcy herein, and that she died subsequent to the adjudication and appointment of Trustee in Bankruptcy herein, as shown by the exhibits attached to such petition.

(b) It was not decided, as shown by the exhibits at-
21 tached to the petition, that the Indiana law of judicial sales is or is not unavailing in bankruptcy, as alleged on page 3 of the petition.

(c) It was not decided, as shown by the exhibits attached to the petition, "that the inchoate interest in real estate of the wife is greater in bankruptcy than under the State laws of the State of Indiana," as alleged on page 3 of the petition.

(d) That the matter of law sought to be revised or reviewed is not stated in the petition, as will appear from the exhibits attached to the petition.

7. The petition does not show wherein the petitioner is injured or prejudiced by the orders he seeks to have this Court review and revise.

8. That the inchoate interest of the decedent, Mary E. Erskine, in and to the real estate of her husband, the bankrupt, became a vested interest in and to said real estate at the date of the adjudication in bankruptcy herein, to-wit: on December 20th, 1921, at which time said decedent was living with her said husband, the bankrupt, as his wife, and thereafter continued to so live with him until the date of her death, to-wit: March 21st, 1922.

9. That, under the Bankruptcy Law and the Statutes of Indiana, the interest of Mary E. Erskine, now deceased, but then the living wife of said bankrupt, in and to the real estate owned by the bankrupt at the date of the adjudication in bankruptcy, did not pass to the trustee in bankruptcy or become a part of the bankrupt's estate but became, immediately, upon such adjudication, vested in said wife as her separate and absolute property and estate.

10. That, by the Bankruptcy Laws and the laws of the State of Indiana, the inchoate interest of Mary E. Erskine in and to the lands of her husband, the bankrupt, became a vested interest on December 20th, 1921, the date of the adjudication in bankruptcy, and was a part of her estate and passed by her will to Harold Taylor, Trustee, at the date of her death, to-wit: March 21, 1922, such interest being a one-fifth interest in the proceeds of the sales of the real estate, and found and adjudged by the Referee in Bankruptcy and approved and affirmed by the United States District Court for the District of Indiana, to be in the sum of $7374.00 and which said sum the Trustee in Bankruptcy was ordered to pay to said Harold Taylor, Trustee under the will of Mary E. Erskine, deceased.

Wherefore, this respondent moves this Court to dismiss the said Petition to Review and Revise the said order of the United States District Court for the District of Indiana, entered April 24, 1923, and to affirm said order, all at petitioner's costs and for all other proper relief.

HAROLD TAYLOR,
JOHN R. BROWNE
DANIEL H. ORTMEYER,
Attorneys for Respondent.

23 State of Indiana } ss:
County of Marion }

HAROLD TAYLOR, on oath says he is respondent to the said Petition to Review and Revise in the above matter, that the facts stated are true, to the best of his knowledge and belief.

HAROLD TAYLOR.

Subscribed and sworn to before me this 6th day of July, 1923.

My commission expires Nov. 25 1926

WALTER J. TINGLE
(Seal) *Notary Public.*

24 (Endorsed) No 3298 U. S. Circuit Court of Appeals Seventh Circuit In Bankruptcy. No. 625 In the Matter of Wilbur Erskine Bankrupt Motion by Respondent Harold Taylor Trustee under will of Mary E. Erskine, deceased, to dismiss Petition of Harry W. Voss Trustee in Bankruptcy to Review and Revise order of U. S. District Court District of Indiana entered April 24, 1923. Filed Jul 7—1923 Edward M. Holloway Clerk Harold Taylor John R Brown 1514 Merchants Bank Bldg Indianapolis, Ind. Daniel H. Ortmeyer Mercantile Bank Bldg Evansville Indiana Attorneys for Respondent

And afterwards, to wit: On the eleventh day of September, 1923, there was filed in the office of the clerk of this court a certain Petition to Complete the Record and Additional Record Attached" which said Petition, etc., is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

October Term, A. D. 1922

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

ORIGINAL PETITION TO REVIEW AND REVISE

The undersigned petitioner Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, hereby respectfully moves the court for an order directing the correction of the record in this cause on account of the omission therefrom of the trustee's amended petition as filed with the referee in bankruptcy on the 27th day of May, 1922, and the answer of Wilbur Erskine and of Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, filed on the 25th day of June, 1922, and the trustee's petition for a review and assignment of errors filed by the trustee on the 21st day of March, 1923, certified copies of which documents are hereto attached. The undersigned petitioner believes that said documents may be material to said petition in this appeal and were omitted by accident or error.

He further prays that the Honorable Court upon this suggestion direct that the omission be corrected by the filing of said certified copies, all pursuant to the provisions of Equity Rule No. 76 adopted by the Supreme Court of the United States in its October term 1912, and that said certified copies be made a part of the original petition to review and revise and that said original petition to review and revise be amended so as to contain said documents.

Walker & Walker, Counsel for Petitioner.

ACKNOWLEDGEMENT OF SERVICE

The respondents, Wilbur Erskine and Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased, hereby acknowledge

service of a copy of the foregoing motion this 6th day of September, 1923.

Daniel H. Ortmeyer, Harold Taylor, John R. Browne, Counsel for Respondents, Wilbur Erskine and Harold Taylor, Trustee under the will of Mary E. Erskine, Deceased.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

The undersigned Harry W. Voss, Trustee of the estate of Wilbur Erskine, for his amended petition, respectfully shows to the court that in said estate, there is real estate of the value in excess of Twenty Thousand Dollars ($20,000.00); that at the time of the adjudication in bankruptcy, the said bankrupt, Wilbur Erskine, had a wife living, one Mary E. Erskine, that subsequent to said adjudication, to wit; the 22nd day of December, 1921, the said Mary E. Erskine died testate, that Harold Taylor was named Trustee in said will and is vested with all of the real estate that Wilbur Erskine may have acquired an interest in said real estate by the death of Mary E. Erskine; that the said Harold Taylor as such Trustee and Wilbur Erskine as surviving widower, claim an interest in said real estate; that this Trustee in Bankruptcy denies that the said Mary E. Erskine during her life time or said Wilbur Erskine or Harold Taylor, trustee, has subsequently acquired any right, title or interest in said real estate.

Wherefore: this trustee prays that the said Wilbur Erskine and Harold Taylor, trustee under the will of Mary E. Erskine, deceased, be required to come into this court and set up any right, claim or interest they may have in said real estate and that said interest therein be fixed by this court and that the rights of this trustee in Bankruptcy to sell said real estate, be declared free of any claim of said Harold Taylor, trustee, and Wilbur Erskine, and that he recover his costs.

(Signed) Harry W. Voss, Trustee in Bankruptcy of Wilbur Erskine.

STATE OF INDIANA,
Vanderburgh County, ss:

Harry W. Voss, being sworn, says that he is the Trustee named herein; that the statements contained in the foregoing petition are true.

(Signed) Harry W. Voss.

Subscribed and sworn to before me this 25th day of May, 1922. (Signed) Hattie M. Falk, Notary Public. My com. expires Nov. 7, 1922. (Seal.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. #625

In the Matter of WILBUR ERSKINE, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

The undersigned, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, as such trustee, and Wilbur Erskine, separately and severally, for answer to the amended petition of Harry W. Voss, Trustee in Bankruptcy herein, asking that these answering defendants be required to set up any interest they may have in the real estate owned by Wilbur Erskine at the time of his adjudication in bankruptcy and that such interest therein, if any, be fixed by this court, each for himself shows to the court the following:

That said Wilbur Erskine, who is the bankrupt herein, was adjudicated a bankrupt on December 20, 1921; and that at the time of such adjudication in bankruptcy said Wilbur Erskine was, and for many years prior thereto, has been and still is a resident and an inhabitant of the County of Vanderburgh, State of Indiana; and that at the time of such adjudication in bankruptcy said bankrupt was the owner of the following described real estate situated in the State of Indiana, to wit:

That said above described real estate was at the date of said adjudication of the value of more than Twenty Thousand Dollars ($20,000.00) and that at the time of such adjudication said bankrupt had a wife living namely, Mary E. Erskine, sometimes known as Bonnie Erskine; and that said Mary E. Erskine thereafter on Marh 21, 1922, died testate, a resident and an inhabitant of Vanderburgh County, State of Indiana, and that the last will of said Mary E. Erskine, deceased, was thereafter on or about March —, 1922, duly admitted to probate in the Vanderburgh Probate Court, Vanderburgh County, State of Indiana; and that said Mary E. Erskine, deceased, in and by her last will bequeathed and devised all of her estate, real and personal, to the answering defendant herein Harold Taylor, trustee under the will of said Mary E. Erskine, deceased as trustee; and that said Mary E. Erskine, deceased, was sur-ived by the answering defendant herein, Wilbur Erskine, who was her husband and is now her widower; that said bankrupt was seized in fee simple of said real estate above described during his said marriage and at the time of the adjudication in bankruptcy as aforesaid and in the conveyance of which his said wife did not join in due form of law.

That said Mary E. Erskine, wife of Wilbur Erskine as aforesaid, was living on the date of and at the time of the adjudication of said

Wilbur Erskine as bankrupt, on to wit: December 20, 1921; that upon such adjudication the said Mary E. Erskine became absolutely vested with a wife's interest in and to the real estate then owned by her said husband under and in accordance with the laws of the State of Indiana and the Federal Bankruptcy Act. That said Mary E. Erskine never in any way parted with, sold, transferred, assigned or released or in any other way, directly or indirectly, sold, gave up, surrendered, released, transferred or assigned such interest, and that she owned, and was entitled to such interest at the time of her death, on to wit: March 21, 1922, and that said Mary E.Erskine, deceased, at the time of her death, had an interest in said real estate by virtue of her said marriage.

These answering defendants claim that said Mary E. Erskine, deceased, at the time of her said death had an interest in all of the real estate owned by said Wilbur Erskine, the bankrupt herein, at the time of said adjudication in bankruptcy, and that said interest in said real estate of said Mary E. Erskine, deceased, became absolute and vested in her at and upon the adjudication of said bankruptcy and prior to her said death, and that these answering defendants are the owners, or one of them is the owner, of said interest in said real estate owned by said Mary E. Erskine, deceased, at the time of her said death.

Wherefore: these answering defendants pray that the court fix the interest in said real estate owned by said May E. Erskine, deceased, at the time of her said death, and for all other proper relief.

(Signed) Wilbur Erskine. Harold Taylor, as Trustee under the Will of Mary E. Erskine, Deceased. Harold Taylor, Daniel H. Ortmeyer, Attorneys for Defendants.

Subscribed and sworn to before me, the undersigned, by the said Harold Taylor on this 24th day of June, 1922. (Signed) Daniel H. Ortmeyer, Notary Public. My commission expires October 22, 1925. (Seal.)

In the District Court of the United States for the District of Indiana

In Bankruptcy. No. 625

In the Matter of Wilbur Erskine, Bankrupt

To the Honorable Charles A. Burnett, referee in bankruptcy:

Your petitioner respectfully shows:

First. That your petitioner is the trustee in bankruptcy of the estate of the above named bankrupt.

Second. That on the 14th day of March, 1923, an order, a copy of which is hereto annexed, was made and entered herein;

Third. That such order was erroneous in that:

(A) One-fifth (1/5) of the proceeds of sales of real estate made by said trustee were ordered to be paid to Harold Taylor as Trustee under the will of Mary E. Erskine;

(B) That such order was erroneous and contrary to law in that Harold Taylor as such trustee was not entitled to any part of the proceeds.

C. That said order was erroneous for the reason that the amount directed to be paid to the said Harold Taylor, trustee, was too large:

D. That said order was contrary to law;

E. That said order is not in accord with the laws and statutes of the State of Indiana.

F. That said order is contrary to the evidence.

Wherefore: Your petitioner feeling aggrieved because of such order prays that the same may be reviewed as provided by bankruptcy law of 1898 and General Order XXVII.

Dated at Evansville, Indiana, this — day of March, 1923.

(Signed) Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, Bankrupt.

STATE OF INDIANA,
County of Vanderburgh, ss:

Harry W. Voss, being sworn upon his oath says that he is trustee in bankruptcy of the foregoing estate; that the statements of fact contained in the foregoing petition are true according to the best of his knowledge, information and belief.

(Signed) Harry W. Voss.

Subscribed and sworn to before me this 15th day of March, 1923. (Signed) Charlotte Kerth, Notary Public. My commission expires December 31, 1925.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA

In Bankruptcy. No. 625

In the Matter of WILBUR ERSKINE, Bankrupt

At Evansville, in said District, on the 14th day of March, 1923. Before Charles A. Burnett, Referee in Bankruptcy

Harry W. Voss, as Trustee herein, having filed on the 27th day of May, 1922, his verified amended petition herein showing that there is real estate in said bankrupt estate of the value of more than $20,-

000.00, that at the time of the adjudication in bankruptcy herein the bankrupt had a wife living, namely Mary E. Erskine, who died testate on the 21st day of March, 1922, that Harold Taylor was named trustee in the will of said decedent and is vested with all of the real estate that said Wilbur Erskine may have acquired and interest in by the death of said Mary Erskine, that said Harold Taylor, as such trustee, and said Wilbur Erskine, as such surviving widower, claim an interest in said real estate, and that said trustee in bankruptcy denies that said Mary E. Erskine, during her lifetime, or that said Wilbur Erskine or said Harold Taylor, trustee, subsequently have acquired any right, title or interest in said real estate; and on the twenty-sixth day of June, 1922, the said Wilbur Erskine, and said Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, having answered said amended petition and asked that the court fix the interest in said real estate owned by said Mary E. Erskine at the time of her death, the said Harry W. Voss, the trustee in bankruptcy, appearing herein by Walker & Walker, his attorneys, and the said Wilbur Erskine, and Harold Taylor, as trustee under the will of Mary E. Erskine, deceased, appearing by Daniel H. Ortmeyer and Harold Taylor; and at Evansville in said district, on the 21st day of November, 1922, a hearing having been had upon the issues joined, an agreed statement of facts submitted, and argument of counsel begun but not concluded and such argument having been concluded on the 22nd day of November, 1922, and thereupon it having been agreed that briefs should be filed; and said briefs having been submitted and read and the evidence having been duly considered and the referee being advised in the premises, now therefore:

It is ordered:

That said trustee in bankruptcy take nothing by his said amended petition and that the same be and it is hereby dismissed.

That said Harold Taylor as such trustee under the last will of Mary E. Erskine, deceased, is entitled to and that he do have and recover herein an amount equal to one-fifth of the proceeds of the sales of the real estate which have been made by the trustee in bankruptcy herein pursuant to the stipulation and agreement entered into by said Harry W. Voss trustee in bankruptcy, Wilbur Erskine, as such surviving husband and Harold Taylor as said trustee, under which all of the real estate of the bankrupt has been sold and deeds of conveyance made in which all of said parties have joined, the said one-fifth of said proceeds amounting to the sum of $7,374.00.

That said Harry W. Voss, the trustee herein, pay said sum of $7,374.00 to said Harold Taylor, as trustee under the last will of Mary E. Erskine, deceased, out of the funds in his hands belonging to said bankrupt estate.

—— ——, Referee in Bankruptcy.

William Kappas, Clerk of the District Court of the United States for the District of Indiana hereby certifies that the foregoing are full and true complete copies of the trustee's amended petition filed in Cause number 625, In the matter of Wilbur Erskine, bankrupt,

on the twenty-seventh day of May, 1922, with Charles A. Burnett referee in bankruptcy, also the answer of Wilbur Erskine and Harold Taylor filed on the 26th day of June, 1922, with Charles A. Burnett referee in bankruptcy, also petition for review and assignment of errors of Harry W. Voss, trustee in bankruptcy of the estate of Wilbur Erskine, filed on the twenty-first day of March, 1923, with Charles A. Burnett, referee in Bankruptcy.

Witness my hand and the seal of said court at Evansville, this 7th day of Sept., 1923.

William P. Kappes, Clerk of the District Court of the United States for the District of Indiana, by C. E. Harman, Deputy. (Seal.)

Endorsed: Filed September 11, 1923. Edward M. Holloway, Clerk.

And afterwards, on the same day, to wit: On the eleventh day of September, 1923, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Tuesday, September 11, 1923.

Court met pursuant to adjournment.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Evan A. Evans, Circuit Judge

3298

In the Matter of Wilbur Erskine, Bankrupt

Harry W. Voss, as Trustee of the Estate of Wilbur Erskine, Bankrupt,

vs.

Harold Taylor, Trustee under the Will of Mary E. Erskine, Deceased, and Wilbur Erskine

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

On motion of counsel for petitioner, it is now here ordered that the following certified copies of certain parts of the record in this cause be filed and made a part of the petition to review and revise heretofore filed in this court, subject to the objection of the respondents:

(1) Trustee's Amended Petition, filed in Cause No. 625, In the Matter of Wilbur Erskine, Bankrupt, on May 27, 1922, with Charles A. Burnett, Referee in Bankruptcy.

(2) Answer of Wilbur Erskine and Harold Taylor, filed June 26, 1922, with Charles A. Burnett, Referee in Bankruptcy.

(3) Petition for Review and Assignment of Errors of Harry W. Voss, Trustee in Bankruptcy of the estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, Referee in Bankruptcy.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United Staes court-room, in the city of Chicago, in said Seventh Circuit, on the second day of October, 1923, of the October term, in the year of our Lord one thousand nine hundred and twenty-three, and of our Independence the one hundred and forty-eighth.

And afterwards, to wit: On the second day of January, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Wednesday, January 2, 1924.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk; Robert R. Levy, Marshal.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, et al., etc.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

It is now here ordered that this cause be, and the same is hereby set down for hearing Tuesday, January 8, 1924

And afterwards, to wit: On the eighth day of January, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Tuesday, January 8, 1924.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Francis E. Baker, Circuit Judge, presiding; Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk; Robert R. Levy, Marshal.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, etc., et al.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

Now this day come the parties by their counsel and this cause now comes on to be heard on the petition to review and revise an order of the District Court of the United States for the District of Indiana, the answer thereto, the briefs of counsel and on oral arguments by Mr. Henry B. Walker, counsel for petitioner and by Mr. Harold Taylor, counsel for respondents, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the twentieth day of June, 1924, there was filed in the office of the clerk of this court the opinion of the court, which said opinion is in the words and figures following to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1923, JANUARY SESSION, 1924

No. 3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE, Respondents

Original Petition to Review and Revise an Order of United States District Court for the District of Indiana

Before Alschuler, Evans, and Page, Circuit Judges

OPINION BY PAGE, CIR. J.

Wilbur Erskine, on December 20, 1921, when adjudicated a bankrupt, was a resident of the state of Indiana, and was married to his first wife, who died March 21, 1922, survived by her husband and two children.

Before the filing of the petition and adjudication, bankrupt owned, in fee simple, a considerable amount of real estate. His wife left a last will and testament, naming respondent Taylor trustee thereunder. Petitioner Voss was elected trustee of the bankrupt estate.

After the death of the wife, who had never joined in any conveyance, the real estate was sold, by stipulation between petitioner, respondent and bankrupt, all parties joining in the deeds.

The rights of respondent, as trustee under the will, were, by agreement of all of the parties, submitted to the court in bankruptcy, and its holding was favorable to the claim of respondent and bankrupt that, upon the filing of the petition and the adjudication in bankruptcy, the wife became vested with the same rights in the estate of the bankrupt that she would have had thereunder had she survived her husband.

This case is brought here by petition to review and revise, and a motion is made to dismiss on the ground that the case should have been brought here by appeal.

In support of his contention that this case is properly before this court on a petition to review and revise, petitioner's main reliance is upon Coder v. Arts, 213 U. S. 223. Because of the difference between the facts in that case and the case at bar, it is inapplicable here to support petitioner's contention. In that case a creditor filed his claim, and it was allowed in bankruptcy. In connection therewith, and as a part thereof, he asked for priority, and the court held that

the claim for priority was merely incident to the allowance of the claim. In the case at bar, respondent is not a creditor and is not seeking the allowance of a claim, as such. The sole thing that respondent and bankrupt are seeking to do is to have carved out and set aside to them, as their property, free from administration in bankruptcy, a very considerable portion of the property which would otherwise be administered in bankruptcy and distributed to creditors.

This court in In re Breyer Printing Co. 216 Fed. 878, pointed out so clearly the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings" that it will serve no good purpose to add to what was there said. We there also discussed Coder v. Arts, supra, and other leading cases wherein there is pointed out the distinction between "proceedings in bankruptcy" and "controversies at law and in equity arising in the course of bankruptcy proceedings."

It seems clear, under the facts in the instant case, that the question here involved is one

"between the * * * trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants" (respondents) "on the other, concerning property in the possession of the * * * trustee * * * to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors."

This is the language of In re Breyer Printing Co., supra.

Counsel for petitioner rely upon In re Petronio, 220 Fed. 269, in which we held that the proceeding in the district court was of a summary nature, citing In re Goldstein, 216 Fed. 887, 889, and In re Breyer Printing Co., supra. In the Goldstein Case, after distinguishing between summary and plenary methods of procedure, we said:

"The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. * A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

That was a petition to review and revise, which raised only the question of the jurisdiction of the court to enter any order other than one of dismissal, after it was ascertained that there was a claim to property that was not merely colorable. The Petronio Case is of like character. There the District Court, in the face of the fact that its jurisdiction was disputed, and the further fact that a substantial and not a colorable claim was set up, proceeded to adjudicate the matter in a summary way, and therefore both the Petronio and Goldstein Cases were reviews of summary orders in bankruptcy.

The other authorities cited by petitioner are in harmony with the authorities here cited.

The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the parties could not affect the method of procedure to procure a review.

For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an act of September 6, 1916, (39 U. S. Stats. at L. p. 727; Sec. 1649a U. S. Compiled Stats. 1916:

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, supra, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are lawsuits of the same kind and quality as other lawsuits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms "appeal" and "writ of error" should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, especially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal.

Respondent Taylor, trustee, repudiates the suggestion of petitioner that he claims any title under the Indiana judicial sales act of 1875 (Secs. 3052 and 3055, page 178, Burns, 1914), but asserts,

"That the rights and interests of his decedent" (Mary E. Erskine) "in and to the lands of said bankrupt vested in her upon the adjudication by operation of law and by virtue of the general laws of the state of Indiana, being Sections 3014, 3029, 3037 and 2864, Burns' 1914," (being, respectively, Secs. 17, 27 and 35 of Act of 1852, regulating descents, and Sec. 122 of the Decedents' Estates Act of 1881, for the settlement and distribution of estates).*

*"17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value

What respondent's argument means by a vesting upon adjudication by operation of law seems to be based upon three things: (a) That under Section 75-a-5 of the Bankruptcy Act, the inchoate right of dower of the wife does not pass to the trustee; (b) That upon adjudication "So far as the bankrupt's property was concerned, after the adjudication, he was, as it were, civiliter mortuus. His rights in the property were the same as though he were dead."; (c) That, by reason of a and b, there was vested absolutely in the constructive widow all of the rights that she would have had as actual widow of a deceased husband.

In Bank v. Sherman and Hickling v. Sherman, 101 U. S. 403, relied upon in support of proposition b, dower rights were not involved, but the court, commenting upon the effect of filing petition in bankruptcy, said:

"The filing of the petition was a caveat to all the world. * * * Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. * * * If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, civiliter mortuus."

We think that what was said in Re Dayton Coal & Iron Co. 291 Fed. 390, as to a part of the above quotations is reasonably applicable to all of it. The statement, "The bankrupt became, as it were, for many purposes, civiliter mortuus," we think is used more as an illustration than as a judicial determination, and certainly should not be held to have any influence on the determination of the issue in this case. In Platner v. Sherwood, 6 Johnson's Chancery Reports (N. Y.), 118, 123, it is said:

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ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth, as against creditors."

"27. A surviving wife is entitled, except as in section 17 (Sec. 2483) excepted, to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions."

"35. No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

"122. If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds parts thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof, for said purpose."

a May be conceded.

"But the civil death spoken of in the books, is of two kinds: 1. Where there is a total extinction of the civil rights and relations of the party, so that he can neither take nor hold property, and his heirs succeed to his estate in the same manner as if he were really dead, or the estate is forfeited to the crown; 2. Whre there is an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate to the crown. Of the first kind, are the cases of monks professed, and abjuration of the realm; all the other cases are of the second kind. Strictly speaking, there are but two cases of civil death; those of a monk professed, and an abjuration of the realm."

The bankrupt here was not in either class. One against whom a petition in bankruptcy has been filed, and against whom adjudication has been had, is not under any disability of any kind or character, except that his right to deal with the property owned at the time of the filing of the petition is in some ways restricted. He is under no civil disability whatever. Even as to his property that passes to the trustee by operation of law upon adjudication as of the time of filing the petition he still may deal with it in certain ways. He has the power either before or after adjudication to contract with his creditors for a composition, (Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co. — U. S. —, opinion filed May 26, 1924), and such dealing is a matter of common and almost daily practice. In all cases, upon confirmation of composition, either before or after adjudication, the property that passes by operation of law to his trustee, again, by operation of law, passes from the trustee to him. (Sec. 70f Bankruptcy Act.) In most states, a bankrupt has exemptions, sometimes returnable to him in personal property, sometimes out of the real estate as a homestead. If a bankrupt is in any sense civiliter mortuus, he is not so in any such sense as would contribute or give effect to any section of the Indiana statute cited. Counsel say that cases construing Section 70a have uniformly held that the title of the trustee vests as of the date of adjudication, and that the wife's inchoate interests vest in her at the same time. No cases are cited. A wife's inchoate rights vest upon marriage or when the property is acquired after marriage. Unless there is some provision of some Indiana statute that operates to change the widow's inchoate right and increase it to a present fixed right, upon adjudication against the husband in bankruptcy, then there is not at the time of the vesting of the husband's estate in the trustee any change whatever in the wife's rights. The purpose of Section 70a is not to affect or change the wife's interest. Quite the contrary is true. It simply leaves a wife's interest where it finds it. In Porter v. Lazear, 109 U. S. 84, 86, the court cites English authorities, and says:

"By the law of England, which is our law in this respect, except so far as it has been changed by statute, the wife's right of dower is no part of the estate of the husband, and is not affected by proceedings in bankruptcy against him."

In Davis v. Kelly, decided by the Supreme Court of Indiana, February 2, 1912, and reported in 97 N. E. at page 336, discussing Section 3062 Burns Ann. Statute, a section of the judicial sales act of 1875, said (p. 337):

"A proper construction of the act of 1875, as applied to the facts of the present case, requires the determination of the law prior to its passage. Under the statutes of 1852, a wife's inchoate interest in the real estate of her husband might become absolute in two ways: (1) Where a husband dies seized of real estate, the widow took by descent, as her husband's heir, under section 17 of the statute of descents, being section 2483 R. S. 1881 (Sec. 3014, Burns 1908). (2) Where the husband's title was divested during coverture the wife not joining in any conveyance, the wife took, upon surviving her husband, not by descent, but by virtue of her marital rights, under section 27 of the statute of descents, being section 3029 Burns 1908 (Section 2491, R. S. 1881). * * *

"It is evident that, when a husband's land was sold at judicial sale prior to the taking effect of said act of 1875, and the husband subsequently died, leaving his wife surviving him, the wife took title in fee simple, not by descent, but by virtue of her marital rights under said section 27" (Section 3029 Burns). * * * Prior to that time, where a husband's land was sold at judicial sale, the inchoate interest of the wife did not become absolute until the husband died, leaving the wife surviving him. During the husband's lifetime the entire title, together with the right of possession, was vested in the purchaser at the judicial sale. If the wife died during the husband's lifetime, her inchoate right was defeated altogether, and the title of the purchaser at the judicial sale became absolute. The purpose of the act of 1875 was to alter these rules of law by providing that the wife's interest should become absolute without reference to her survivorship of her husband. (Citing cases.) The evident purpose of said act of 1875 was to hasten the time at which the wife's inchoate interest should become absolute in cases of judicial sales. To this extent and for this purpose the previous law was changed. * * * As the inchoate interest of the wife in the land of her husband in the conveyance of which she did not join vested in her and became absolute on the death of her husband prior to the taking effect of said act of 1875, under said section 27 of the statute of descents * * * it follows that under said act of 1875 the inchoate interest of the wife in her husband's land sold at judicial sale vests and becomes absolute under said section 27, supra, upon the consummation of such sale."

It seems clear from this decision that in so far as the Indiana statutes are here involved, the Indiana law, except as changed by the act of 1875, under which respondent here is claiming no rights, is exactly as it was prior to said act. Sections 27 and 17, referred to in the above case, are Sections 3029 and 3014 Burns, respectively, here relied on by respondent. Section 27 has reference to the rights of a "surviving wife." Section 17 disposes of the interests of the wife "if a husband die testate or intestate." There is nothing in any of

the four sections, 3037, 3029, 3014 *or* 2864, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute.

A very diligent search of the Indiana authorities has failed to reveal to us any case in which the courts of Indiana have held that the wife's inchoate interest has been advanced so as to become absolute prior to the husband's death, unless such cases have been based and bottomed upon the act of 1875. Lawson v. De Bolt, 78 Ind. 563; Wright v. Gelvin, 85 Ind. 128; Chase v. Van Meter, 140 Ind. 321. And the same search has revealed to us many cases in which the Supreme Court of Indiana has held that the interest of the wife is conditional, depending upon her survivorship. Fry v. Hare, 166 Ind. 415, 420.

We are of opinion that on the death of the widow all her right in this property was extinguished, and that no interest in the property passed to Taylor, her trustee.

The order of the District Court should be, and it hereby is, reversed, and the cause remanded for further proceedings in conformity herewith.

A true copy: Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to wit: On the twentieth day of June, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Friday, June 20, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. Evan A. Evans, Circuit Judge

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, as Trustee of the Estate of Wilbur Erskine,

vs.

HAROLD TAYLOR, Trustee under the Will of Mary E. Erskine, Deceased, and WILBUR ERSKINE

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

This cause came on to be heard on the petition to review and revise an order of the District Court of the United States for the

District of Indiana, entered therein on April 24, 1923, and the answer thereto and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the said order of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be remanded to the said District Court for further proceedings in conformity with the opinion of this court.

And afterwards, to wit: On the third day of July, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Thursday, July 3, 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.

3298

In the Matter of WILBUR ERSKINE, Bankrupt

HARRY W. VOSS, Trustee, etc.,

vs.

HAROLD TAYLOR, Trustee, etc.

Original Petition to Review and Revise an Order of the District Court of the United States for the District of Indiana

On motion of Mr. Harold Taylor, counsel for respondent it is now here ordered that the time for filing a petition for a rehearing in this cause be, and the same is hereby extended fifteen (15) days from the time allowed by the rules of this court.

And afterwards, to wit: On the thirty-first day of July, 1924, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Thursday, July 31 1924.

Court met pursuant to adjournment.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. George T. Page, Circuit Judge; Edward M. Holloway, Clerk.